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No. 79-919

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHLOE WHISKERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-32a) is reported at 600 F. 2d 1332. The opinion of the district court (Pet. App. 1a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1979. A petition for rehearing was denied on August 14, 1979 (Pet. App. 33a). On November 1, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including December 12, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Southern Paiute Judgment Distribution Act, Pub. L. No. 90-584, 82 Stat. 1147, and Sections 2 and 22 of the Indian Claims Commission Act, 25 U.S.C. 70a and 70u, are set forth at Pet. 2-6.

QUESTION PRESENTED

Whether the United States has waived its sovereign immunity against the claim of petitioners that they were given inadequate notice of their right to participate in a judgment fund created by Congress.

STATEMENT

Petitioners are individual Indians who claim that they were improperly excluded from participation in a judgment fund created by Congress to settle certain litigation with the Southern Paiute Nation. They filed a suit for damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), alleging breach of fiduciary duty in distributing the fund without adequate notification to Indians who might be eligible for enrollment.

The fund in question derives from a stipulated judgment of the Indian Claims Commission, entered in 1965, which was obtained by six groups of Southern Paiute Indians in the sum of $7,253,165. The judgment was intended to compensate the Southern Paiutes for the taking of land in southern Utah and northern Arizona. Congress appropriated the funds needed to satisfy the judgment (Second Supplemental Appropriation Act, 1965, Pub. L. No. 89-16, 79 Stat. 81, 108-109) and enacted the Southern Paiute Judgment Distribution Act (SPJDA), Pub. L. No. 584, 82 Stat. 1147 (Pet. 2-4) to distribute the award. The Act directed the Secretary of the Interior to prepare a roll of persons composed of

various groups of Southern Paiute Indians who were eligible to participate in the distribution. Section 2 of the SPJDA, 82 Stat. 1147, expressly provided:

> Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Phoenix, Arizona, in the manner and within the time limits prescribed by the Secretary for that purpose. The Secretary's determinations on all applications for enrollment shall be final.

To satisfy this directive, the Secretary's regulations required applications for enrollment to be filed in the appropriate regional office of the Bureau of Indian Affairs no later than June 30, 1969. 25 C.F.R. 41.3(*l*)(4) (1978). The final roll containing eligible claimants included 1,157 persons. The entire judgment fund was distributed in per capita shares to those persons so enrolled (Pet. App. 3a).

Petitioners' first complaint was filed on behalf of 1,337 Indians who alleged that the Secretary had given inadequate notice of the fund's distribution. A second amended complaint was subsequently filed, setting forth class action claims on behalf of all Southern Paiute lineal descendants who did not receive a share of the distribution. The complaint sought damages against the United States in the amount of $7,522 for each Indian, plus compound interest from the date of distribution at the rate of 8%. A third amended complaint was later filed, which reduced the claimed interest to bring the complaint within the district court's jurisdiction under the Tucker Act. The complaint asserted breach of a trust relationship between the United States and the class members and a violation of statutory duties under the SPJDA. It further alleged that the class members had a property interest in the fund that the Secretary had wrongfully taken by virtue of his failure to provide adequate notice (Pet. App. 3a-4a).

The government moved to dismiss the complaint for want of jurisdiction and failure to state a claim, contending that the United States had not consented to suit and that neither the SPJDA, the Fifth Amendment, nor any other statute gave petitioners an enforceable right against the United States. The district court dismissed the complaint, holding that petitioners had failed to demonstrate the existence of an enforceable right against the United States and that no statutory trust relationship existed between petitioners and the United States (Pet. App. 1a-14a). The court also concluded that petitioners had no "property" right in the judgment fund. The court explained that although they had an expectancy that might ripen into a right if they enrolled and were found eligible to participate, none of them had complied with the procedures prescribed by Congress to create an entitlement (Pet. App. 5a-13a). In the absence of any statutory waiver of sovereign immunity or showing of deprivation of constitutional right, the district court dismissed the Tucker Act complaint on the authority of *United States* v. *Testan*, 424 U.S. 392 (1976). The court of appeals affirmed (Pet. App. 14a-32a).

ARGUMENT

The decision of the court of appeals correctly applied the rule of this Court's decision in *United States* v. *Testan*, 424 U.S. 392 (1976). The court's decision does not conflict with any other decision and further review by this Court is not warranted.

1. As both courts below correctly concluded, petitioners have wholly failed to identify any statutory or constitutional provision that gives them an enforceable right against the United States for money damages (Pet. App. 5a-13a, 18a-32a). In their petition in this Court, petitioners do not even attempt to refer to statutory

language that could be construed as a waiver of the sovereign immunity of the United States with respect to their claim of failure to provide adequate notice. *United States* v. *Testan*, *supra*, establishes that the Tucker Act, under which petitioners bring suit, does not by itself create a substantive right for money damages enforceable against the United States. See also *Hatzlachh Supply Co.* v. *United States*, No. 78-1175 (Jan. 21, 1980), slip op. 5 n.5. As *Testan* emphasizes, it is not sufficient to allege that the United States failed to discharge its duties under a particular statute. The Court noted that "waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed' " (424 U.S. at 399, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)), and added that a statute relied upon as a predicate for relief must be fairly interpreted as " '*mandating* compensation by the Federal Government for the damage sustained.' " 424 U.S. at 402, quoting *Eastport S.S. Corp.* v. *United States*, 372 F. 2d 1002, 1009 (Ct. Cl. 1967) (emphasis supplied).

As explained by the court of appeals, the SPJDA established a mechanism for distributing a limited settlement fund to persons who comply with specified administrative procedures for filing claims (Pet. App. 20a-30a). That Act did not establish a trust fund or make petitioners beneficiaries of any fiduciary relationship; and it did not waive the sovereign immunity of the United States with respect to claims of inadequate notice of the existence of the fund.[1] Under these circumstances, the court properly concluded that

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[1]The petition refers to no provision of law that suggests that the United States waived its sovereign immunity for claims of faulty notification, or that it made petitioners the beneficiaries of a "trust" relationship.

petitioners had failed to satisfy the *Testan* requirement of a specific congressional mandate to compensate those injured by the violation of a substantive right (Pet. App. 20a-30a).[2]

2. Petitioners also argue (Pet. 9-10, 12-14) that the special equities of their situation require that they be given a remedy against the United States. They contend that the notice given by the Secretary was inadequate due to their rural residence, comparative isolation, and limited knowledge of English. But the SPJDA was intended by Congress to distribute a limited settlement fund with efficiency. The stipulated settlement was carefully explained to the Indian leaders and other members of the Paiute Nation who had engaged in litigation with the United States, and their approval was obtained. *Southern Paiute Nation* v. *United States*, 14 Ind. Cl. Comm. 618 (1965). This was followed by a substantial notification effort by the Secretary. See Defendant's Answers to Plaintiff's Interrogatories, para. 10.[3] As previously noted, Congress has prescribed that claims for enrollment under the SPJDA must be filed within the time period specified by the Secretary and that his determinations are final. Under these circumstances, it is beyond dispute that the distribution of the settlement fund proceeded in the manner directed by Congress, which is all that the law requires. See

[2]Because the court of appeals concluded that no statutory trust relationship existed between petitioners and the United States, this case does not raise the questions presented in *United States* v. *Mitchell*, No. 78-1756 (argued Dec. 3, 1979).

[3]Nothing in the SPJDA requires personal notice to each possible claimant. The costs of notice were deductible from the settlement fund, and could not be ignored in devising an efficient scheme of distribution. See Section 3 of the Act, 82 Stat. 1147 (Pet. 3).

Delaware Tribal Business Committee v. *Weeks*, 430 U.S. 73, 84-85 (1977). In *Weeks*, this Court approved the exclusion of a group of Indians from participation in an Indian Claims Commission judgment, noting the importance of avoiding "undue delay" and "administrative difficulty" by adopting an efficient distribution plan. 430 U.S. at 89.

As the district court correctly pointed out, Congress is free, if it concludes that the distribution of the settlement fund has resulted in actual unfairness, to enlarge the fund and add a group of additional beneficiaries after promulgation of the final eligibility roll. See Pet. App. 10a. See also *Delaware Tribal Business Committee* v. *Weeks, supra*, 430 U.S. at 84-85; *Choctaw Nation* v. *United States*, 100 F. Supp. 318, 324-325 (Ct. Cl. 1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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